



Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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In the Matter of
Competition in the
Railroad Industry

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Docket No. EP 705
FR Doc. No. 2011-774

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

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On behalf of the Competitive Enterprise Institute (CEI), a non-profit public policy organization that specializes in regulatory issues, I respectfully submit this comment letter in reply to the Surface Transportation Board's (hereafter STB or Board) request for comments on *Competition in the Railroad Industry*.¹

This comment letter develops the following points:

1. STB should reject reregulating the railroad industry with respect to "bottleneck" carriers, as this will enhance neither competition nor economic efficiency.
2. Regulatory inefficiencies in the railroad industry do exist. However, this is a matter more appropriately addressed by Congress, not through STB rulemaking.

1. Enhancing the regulation of "bottleneck" rail carriers will harm the rail industry and shippers alike.

In recent years, some Members of Congress have proposed legislation to cap the freight rates that railroads can charge so-called "captive shippers." Such reregulation would roll back 30 years of market liberalization and nearly a century of bottleneck regulation and judicial precedent. It would partially erase the positive gains enjoyed by the railroad industry, shippers, and consumers.

Captive shippers, those who lack economical transport alternatives to a monopoly rail line, are already subject to some regulatory protection. From an economic efficiency standpoint, these shippers should be expected to contribute the most to the railroads' fixed costs.² Railroads are extremely capital intensive—cost maintenance and expansion are both necessary for profitability—and should not be faulted for capturing revenue in the most efficient, socially beneficial manner possible given competitive constraints.³

A study commissioned by the Board found that recent increases in revenue per ton-mile (RPTM) were not the result of an alleged "increased exercise of market power by the railroads."⁴ Furthermore, a former STB chairman has estimated that only 15 to 20 percent of freight rail movement would be considered "captive" by the Board.⁵ The STB should not

¹ Surface Transportation Board, *Competition in the Railroad Industry*, January 14, 2011, Docket No. EP 705, FR Doc No: 2011-774.

² Pricing based upon Ramsey principles is the most efficient way for a firm that faces decreasing marginal and average costs to recoup costs from its customers—to maximize societal welfare.

³ See, e.g., Russell Pittman, "The Economics of Railroad 'Captive Shipper' Legislation," *Economic Analysis Group Discussion Paper*, U.S. Department of Justice, Antitrust Division, Economic Analysis Group, January 2010, p. 16, <http://www.justice.gov/atr/public/eag/255003.pdf>.

⁴ Laurits R. Christensen Associates, "An Update to the Study of Competition in the U.S. Freight Railroad Industry," *Final Report*, Prepared for the Surface Transportation Board, January 2010, p. 5-20, <http://www.stb.dot.gov/stb/docs/CompetitionStudy/Final/January%202010%20Report.pdf>.

⁵ John Frittelli, "Railroad Access and Competition Issues," *CRS Report for Congress*, Congressional Research Service, August 3, 2007, p. 1, available for download at: <http://www.publicpower.org/files/PDFs/CRSReportoRailCompetitio80307.pdf>.

risk harming the majority of shippers in order to satisfy the demands of a minority who lack economical transport alternatives to their present single rail carrier.

Since the Staggers Act was enacted in 1980, the railroad industry has invested approximately \$480 billion to modernize its infrastructure and operations.⁶ Only recently has the industry been able to collect revenue sufficient to ensure long-term network viability. Adding additional regulatory burdens to the industry will only serve to reduce societal welfare for the limited benefit of a minority of shippers. The STB should seek to preserve regulatory certainty, rather than undermine a crucial sector of the American economy.

2. Economic inefficiency arising from the present regulatory apparatus could be reduced within the railroad industry, but this requires action by Congress, not the Board.

Captive shippers have often complained that they and their customers pay disproportionately for the inefficiencies of the railroad industry. This is true to some extent. The freight rail industry suffers from inefficient practices, but these are not the result of a lack of adequate regulation or of the deregulation of recent decades. On the contrary, outdated and onerous labor regulations—stemming primarily from the Railway Labor Act (RLA)—and the workplace rules that result from railroad industry collective bargaining agreements contribute significantly to these problems and should be revisited.

However, the action required is beyond the scope of the STB and would require legislative reform of the RLA. For example, the process to decertify a union under the RLA is incredibly difficult. Industries other than the railroads and airlines are regulated under the National Labor Relations Act and have a far more straightforward procedure to decertify unions, which “allows employees to hold an election to decertify a union if 30 percent of workers in a bargaining unit show interest.”⁷ In contrast:

It is technically possible for workers unionized under the Railway Labor Act to decertify a union, but it is extremely difficult. The workers have to wait two years after the union is certified to launch what is called a “straw man” election. Worse, an option for outright decertification may not be placed on the ballot. Instead, following the two-year wait, the workers seeking decertification then have to put up an individual or create a fictitious organization—the straw man—to challenge the incumbent union.⁸

⁶ Association of American Railroads, “The Impact of the Staggers Rail Act of 1980,” *Background Paper*, March 2011, p. 3, <http://www.aar.org/KeyIssues/~media/aar/Background-Papers/The-Impact-of-Staggers.ashx>.

⁷ Russ Brown and Ivan Osorio, “The Case for Reform of the Railway Labor Act,” *OnPoint* No. 172, Washington, D.C.: Competitive Enterprise Institute, February 24, 2011, p. 2, <http://cei.org/sites/default/files/Russ%20Brown%20and%20Ivan%20Osorio%20-%20The%20Case%20for%20Reform%20of%20the%20RLA.pdf>.

⁸ *Ibid.*

Removing barriers to decertification could significantly challenge the union-dominated status quo, which is responsible for unnecessary, expensive workplace rules advocated by the various trade unions that represent different classes of railroad workers.

Conclusion

The Surface Transportation Board should resist attempts to reregulate the railroad industry, which, according to the Bureau of Transportation Statistics' *2007 Commodity Flow Survey*, accounts for about 46 percent of total ton-miles moved annually.⁹ While there are indeed regulatory inefficiency problems in the railroad industry, reform must come from Congress, not the STB.

⁹ Bureau of Transportation Statistics, *2007 Commodity Flow Survey*, April 2010, p. 4., http://www.bts.gov/publications/commodity_flow_survey/final_tables_december_2009/pdf/entire.pdf.